IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Samrat Mercantile Private Limited v. National Multi Commodity Exchange of India Ltd. & others.

S.B.CIVIL WRIT PETITION NO.2619/2004
under Articles 226 and 227 of the Constitution of India.

Date of Order : 2nd June, 2006

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Sandeep Bhandawat, for the petitioner.
Mr. Vikas Balia]
Mr. V.K.Mathur] for the respondents.

BY THE COURT :

The petitioner, a company registered under the Companies Act, 1956, carries on business online through V-SAT.

The respondent No.1 was incorporated under the Companies Act on 20.12.2001 in the name of Online Commodity Exchange of India Ltd. and its name was changed to “National Multi Commodity Exchange of India Ltd.” on 23.1.2003. It is carrying on business of Organising, Managing, Regulating and Facilitating the operations of exchange members and transactions of

forward trading in permitted commodities through online trade quotation system and settling system.

The petitioner being member of the respondent No.1 since 2002 is having commercial relationship with it. The respondent No.1 collected a special margin of Rs.30,35,443/- from the petitioner in first week of August, 2003 and out of that an aggregate sum of Rs.20 lacs was released on liquidation of short open outstanding position by the petitioner.

The grievance of the petitioner is that the respondent No.1 in spite of the liquidation or fulfilling of short open outstanding position is not releasing and making refund of balance special margin i.e. in the tune of Rs.10,35,443/-. The respondent No.1 has also suspended trading facility of the petitioner w.e.f. June 7, 2004, hence this petition for writ is preferred.

An objection to maintain this petition for writ is raised on behalf of the respondent No.1 in following terms:-

> "the writ petition is not maintainable against the respondent No.1 as the answering respondent is neither a state nor an instrumentality of state, falling within the ambit of Article 12 of the Constitution of India."

To meet the objection above it is contended on behalf of the petitioner that the business of the respondent No.1 is regulated under the Forward Contract (Regulation) Act, 1952 (hereinafter referred to as “the Act of 1952”) being registered and recognised under it and as such is an authority within the meaning of Article 12 of the Constitution of India.

It is emphasised by the petitioner that the respondent No.1 being controlling forward contracts in permitted commodities functions under supervision, control and guidance of “Forward Marketing Commission” established under Section 3 of the Act of 1952. The functioning of the respondent No.1 is for public purpose, therefore, it is an authority and is amenable to writ jurisdiction of this Court. To substantiate the contention, reliance is placed by counsel for the petitioner upon the judgments of Hon'ble Supreme Court given in the case of Ajay Hasia v. Khalid Mujib Sehravardi and others, (AIR 1981 SC 487) and in the case of Pradeep Kumar Bishwas v. Indian Institute of Chemical Biology ([2002]5 SCC 111).

The issue, therefore, before this Court is--is the National Multi Commodity Exchange of India Ltd. (respondent No.1) is an authority within the meaning of Article 12 of the Constitution of India.

Hon'ble Supreme Court in the case of Ajay Hasia (supra) summarised the relevant tests for determining as to whether the body concerned is or not a state, its instrumentality or agency as under:-

> "(1) "One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government."
>
> (2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."
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> (3) "It may also be a relevant factor..... whether the corporation enjoys monopoly status which is the State conferred or State protected."
>
> (4) "Existence of "deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."
>
> (5) "If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

> (6) “Specially, if a department of Govt. is transferred to a corporation, it would be a strong factor supportive of this inference” of the corporation being an instrumentality or agency of Government.”

Hon'ble Supreme Court in the case of Pradeep Kumar Biswas (supra) while considering as to whether the council for scientific and industrial research is a State within the meaning of Article 12 of the Constitution of India, held as under:-

> “40.The picture that ultimately emerges is that the test formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. <u>On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.</u>”
> (Emphasis supplied).

In view of the law laid down by Hon'ble Supreme Court in the case of Pradeep Kumar Biswas (supra) the question as to whether a body is State

within the meaning of Article 12 depends on cumulative facts with regard to financial grants, functions, administrative domination and control of the Government and the control of government must be pervasive and mere regulatory control would not serve to make a body a State within the meaning of Article 12 of the Constitution.

In the case of Zee Telefilms Ltd. and another v. Union of India and others, (2005)4 SCC 649, Hon'ble Supreme Court summarised the guidelines laid down in the case of Pradeep Kumar Biswas (supra), as under:-

> "(1)Principles laid down in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.
>
> (2)The question in each case will have to be considered on the basis of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.
>
> (3)Such control must be particular to the body in question and must be pervasive.
>
> (4)Mere regulatory control whether under statute or otherwise would not serve to make a body a State."

The status of the respondent No.1 is required to be examined by application of the criteria laid down by Hon'ble Supreme Court in the judgments referred above.

The respondent No.1 is a company incorporated under the Companies Act and is also an “Association” under the Act of 1952. The Act of 1952 was enacted with an object to regulate matters relating to forward contracts, the prohibition of options in goods and for the matters connected therewith. The “Association” as defined under the Act of 1952 means any body of individuals whether incorporated or not constituted for the purpose of regulating and controlling the business of sale or purchase of any goods. No association without having recognition and registration under the Act of 1952 carry on business in forward contract. The Central Government under Section 6 of the Act of 1952 may grant recognition to an association on being satisfied that it would be in interest of trade and also in public interest. The recognition so granted may also be withdrawn by the Central Government after giving an opportunity of hearing to the association concerned in the interest of trade or in public interest. By the force of Section 8 of the Act of 1952 the Central Government is empowered to call for periodical returns and also to make inquiry in relation to the affairs of such association or its members. Every recognised

association is required to furnish its annual report to the commission constituted under Section 3 of the Act of 1952. A recognised association is also having power under Section 11 of the Act of 1952 to make bye laws for the regulation and control of forward contracts and it can also be done by Central Government under Section 12. A power under Section 13 is given to the Central Government to supersede governing body of recognised association after providing a reasonable opportunity to the governing body of such association and in interest of trade or in public interest Central Government may also suspend business of a recognised association. A recognised association to undertake business in forward contract is required to be registered in accordance with the provisions of Section 14-A of the Act of 1952. Only a recognised association or its member may enter into a forward contract in respect to a commodity notified by the Central Government under Section 15(1) of the Act of 1952 for a specific area. Section 17 of the Act of 1952 empowers Government to prohibit forward contracts regulating to any commodity to which Section 15 has been made applicable.

From the study of the scheme of the Act of 1952 it is apparent that it essentially regulate business in forward contracts and the association recognised and registered under its provisions are constituted for the purpose of regulating and

controlling the business of sale and purchase of any goods. The Act of 1952 does not create any association but recognise and register association to carry business in forward contract. Such business is regulated and controlled under the Act of 1952 but the association involved in such business is neither administered nor funded under this Act. As such by the Act of 1952 the Central Government and the Forward Market Commission merely regulate forward contract business and the association recognised and registered.

The respondent No.1 being a company incorporated under the Companies Act is having its "Memorandum of Association" and "Articles of Association". The main objects to be pursuaded by the respondent No.1 for its incorporation as prescribed in its "Memorandum of Association" (MoA) are as follows:-

> "A.1.To establish, develop, facilitate, provide maintain, operate, improve and to carry on various activities relating to Commodity Exchange as may be necessary or convenient.
>
> 2.To facilitate, promote, assist, regulate, maintain, operate, run, manage and deal in all permitted commodities subject to the provisions of the Forward Contracts (Regulation) Act, 1952 and the Rules framed thereunder and to provide specialised, advanced, automated and modern facilities for

trading, clearing and settlement of commodities, with a high standard of integrity and honour, and to ensure trading in a transparent, fair and open, manner.

3.To facilitate transactions in all permitted commodities and to establish, provide and maintain a Clearing House, brokerage house, real time price and/or quotation system, warehousing for pursuing the objects and purposes of the Company and to control and regulate the use and administration thereof.

4.To set standards, benchmarks, formulate guidelines, regulate and control dealings in all permitted commodities and to ensure fair dealings therein.

5.To initiate, facilitate and undertake all steps and all such activities in relation to Commodity Exchange as required for better services and protection, including but not limited to; taking measures for ensuring greater liquidity (both in terms of breadth and depth in the trading) providing easier access to the Exchange, facilitate transactions in commodities, to the extent possible in a cost effective, expeditious and efficient manner.

6.To support, develop, promote and maintain a healthy commodity market in the best possible manner for the interested group, the general public and the economy, and also to introduce high standards of professionalism among themselves."

The objects of the company are mainly to regulate trade.

The authorised share capital of the company as prescribed in MoA is of Rs.25 crores divided into 2,50,000 equity shares of Rs.10/- each. At the time of framing of the company out of these 2,50,000 shares 51,600 shares were taken by Shri Shankar Guru (100 shares); National Institute of Agricultural Marketing, Jaipur (100 shares); Gujarat Agro Industries Corporation Ltd., Ahmedabad (100 shares); National Agriculture Cooperative Marketing Federation of India Ltd., New Delhi (100 shares), Neptunes Overseas Ltd., Ahmedabad (100 shares); Central Warehousing Corporation (26000 shares); Gujarat State Agriculture Marketing Board (100 shares); and Shri Kailash Gupta (25000 shares). The Government is having no share capital with the respondent No.1 and also is not a funding source of it.

The “Articles of Association” (AoA) of the company also not prescribes any administrative control of the Government over it. According to Article 113 of AoA the Company is required to appoint Directors nominated by the Government or forward market commission in accordance with the provisions of the Act of 1952, however, the governors appointed under this Article are “Governing Directors” entitled to the same rights and privileges and subjected to the same

obligations as any other directors of the company. Under sub-clause(2) of Article 113 the Company may provide for appointment of the Director who under any trust deed or loan agreement covering the issue of debentures of the company or has advanced loan to the company. Such directors are known as Debenture Directors. The core promoter of the company shall have right to nominate the Managing Director or Chief Executive of Company subject to approval by forward marketing commission and as per the procedure prescribed under the Companies Act, 1956. The core promoter as defined under AoA means and include promoter other than institutional promoter and who had agreed to become subscriber to MoA and AoA. The Chief Executive Officer is whole time director of the company and required to be appointed by the Board of Directors for a period, terms and conditions as decided by the Board itself. The AoA also prescribes for appointment of alternate Director, Nominee Director and Special Director. The entire procedure for working of Board of Directors and the commodities appointed by the Board is given in AoA reading wherefrom it reveals that the Government is having no role to play in administrative functioning of the company.

With the background as narrated above, the issue involved in this petition for writ is to be examined.

It is the position admitted that the respondent No.1 is not a creation of a statute but is created under a statute. No part of the share capital of the Board is held by the Government. No financial assistance is given to it by the Government to meet the whole or entire expenditure. It is true that some Government companies and a cooperative society are having share capital in the company (respondent No.1) but it does not make deep and pervasive financial control of these bodies over the respondent No.1. A substantial part of the shares of the company are in private hands. The company is recognised and registered association under the Act of 1952 but it is having no monopoly status in the field of the business of forward contract. The Governing Directors are nominated by the government but they are not having absolute administrative control over the functionings of the company. Whatever control the government or the forward market commission is having over the respondent No.1 is mere regulatory and not deep and pervasive. The functions and duties of the respondent No.1 are neither public functions nor are closely related to governmental functions. The respondent No.1 is an autonomous body and is not created by a transfer of a government owned company/department. It is a private body that exercises functions mainly relating to trade.

In view of whatever stated above, the respondent No.1 is having no ingredient to treat it as State or its instrumentality or agency or an authority within the meaning of Article 12 of the Constitution of India. The respondent No.1 being not a State or its instrumentality or agency or an authority within the meaning of Article 12 of the Constitution of India is not amenable to writ jurisdiction. Thus this petition for writ is not competent against it. The same, therefore, is dismissed with no order to costs.

(GOVIND MATHUR),J.

kkm/ps.